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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

333 ELLIOTT AVENUE WEST, LLC

Defendant.

NO.

PROSPECTIVE PURCHASER
CONSENT DECREE RE: 333
ELLIOTT AVENUE WEST, SEATTLE,
WASHINGTON

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I. INTRODUCTION

This prospective purchaser consent decree ("Decree") is made and entered into by and between the Washington State Department of Ecology ("Ecology") and 333 Elliott Avenue West, LLC ("333 Elliott"). 333 Elliott is herein referred to as "Defendant."

1. WHEREAS, the purpose of this Decree is to resolve the potential liability of Defendant for known and suspected contamination at the 333 Elliott Avenue West Property in Seattle, Washington (the "Site") arising from a release or threatened release of hazardous substances, to promote the public interest by expediting cleanup activities at the Site and to facilitate the cleanup and redevelopment of contaminated properties in Seattle, Washington.

2. WHEREAS, a Site Diagram and Legal Description are attached as Exhibit A.

3. WHEREAS, Defendant has proposed to participate in the cleanup of the Site and redevelop the Property for commercial use consistent with applicable City zoning provisions and comprehensive plan designations.

4. WHEREAS, Defendant has entered into a contract to acquire the Property.

5. WHEREAS, Defendant intends to purchase the Property and to perform the remedial action outlined in this Consent Decree.

6. WHEREAS, in the absence of this Decree, at the time it acquired the Property, Defendant would incur potential liability under RCW 70.105D.040(1)(a) of the Model Toxics Control Act ("MTCA") for performing remedial actions, or for paying remedial costs incurred by Ecology, resulting from past releases or threatened releases of hazardous substances at the Site, and Defendant has certified that it is not otherwise currently liable under MTCA for remedial action at the Site.

7. WHEREAS, Defendant has developed a Cleanup Action Plan ("CAP") to address soil and groundwater contamination at the Site.

1 8. WHEREAS, this Decree promotes the public interest by expediting cleanup
2 activities at the Site consistent with MTCA, Chapter 70.105D RCW and its implementing rules
3 in Chapter 173-340 WAC.

4 9. WHEREAS, Defendant shall perform the remediation specified in this Decree and
5 the CAP, attached as Exhibit B, in exchange for a covenant not to sue and contribution
6 protection.

7 10. WHEREAS, Defendant's plans for the redevelopment of the Property are not
8 likely to contribute to contamination at the Site, interfere with remedial actions that may be
9 needed on the Site, or increase human health risks to persons at or in the vicinity of the Site.

10 11. WHEREAS, this Decree will provide a substantial public benefit by promoting
11 redevelopment of a former industrial site and yielding substantial new resources to facilitate
12 cleanup to prevent migration of contaminants to Elliott Bay and other areas of the Site.

13 12. WHEREAS, Defendant's remedial actions will lead to a more expeditious cleanup
14 of hazardous substances at the Site than would otherwise occur, and will promote protection of
15 the public health and the environment.

16 13. WHEREAS, the Complaint in this action is being filed simultaneously with this
17 Decree. An answer has not been filed, and there has not been a trial on any issue of fact or law in
18 this case. However, the parties wish to resolve the issues raised by Ecology's Complaint. In
19 addition, the parties agree that settlement of these matters without litigation is reasonable and in
20 the public interest and that entry of this Decree is the most appropriate means of resolving these
21 matters.

22 14. WHEREAS, the Court is fully advised of the reasons for entry of this Decree, and
23 good cause having been shown:

1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

2 **II. AUTHORITY, JURISDICTION AND VENUE**

3 15. This Court has jurisdiction over the subject matter and over the parties pursuant to
4 MTCA, RCW 70.105D. Venue is proper in King County pursuant to RCW 70.105D.050(5)(b).

5 16. Authority is conferred upon the Washington State Attorney General by
6 RCW 70.105D.040(4)(a) and RCW 70.105D.040(5) to enter into a settlement with persons not
7 currently liable for remedial actions at a facility who propose to purchase property if, after public
8 notice, Ecology finds the proposed settlement will lead to a more expeditious cleanup of
9 hazardous substances in compliance with cleanup standards under RCW 70.105D.030(2)(e). In
10 addition, the Attorney General may agree to the settlement if the settlement will yield substantial
11 new resources to facilitate cleanup and expedite remedial action consistent with rules adopted
12 under MTCA, and Ecology finds that the redevelopment or reuse of the property is not likely to
13 contribute to the existing release or threatened release, interfere with remedial actions that may
14 be needed at the site, or increase health risks to persons at or in the vicinity of the site. RCW
15 70.105D.040(4)(b) requires that such a settlement be entered as a consent decree issued by a
16 court of competent jurisdiction.

17 17. Ecology has determined that hazardous substances have been released at the Site.
18 Ecology has not made a determination that Defendant is a PLP for the Site and Defendant has
19 certified that it is not currently liable under RCW 70.105D. Were Defendant to acquire an
20 interest in the Site, however, it could become a PLP as an owner or operator under RCW
21 70.105D.040(1)(a). This Decree is entered prior to Defendant's operation of the Site, or
22 acquisition of any property interest in the Site, to resolve its potential liability for known or
23 suspected Site contamination described in reports and in the CAP and to facilitate a more
24 expeditious cleanup of the Site than otherwise would occur. This Decree is entered into pursuant
25 to the authority set forth in RCW 70.105D.040(5).
26

18. By entering into this Decree, Defendant agrees not to challenge Ecology's jurisdiction in any proceeding to enforce this Decree. Defendant consents to the issuance of this Decree and agrees to perform the remedial actions as specified in this Decree.

19. All Exhibits attached to this Decree are integral and enforceable parts of this Decree.

III. PARTIES BOUND

20. This Decree shall apply to and be binding upon the signatories to this Decree.

The undersigned representative of each party hereby certifies that he or she is fully authorized to enter into this Decree and to execute and legally bind such party to comply with this Decree.

Defendant agrees to undertake all actions required by the terms and conditions of this Decree and not to contest state jurisdiction regarding this Decree. No change in ownership or corporate status shall alter the responsibility of Defendant under this Decree. Defendant shall provide a copy of this Decree to all agents, contractors and subcontractors retained to perform work required by this Decree and shall ensure that all work undertaken by such contractors and subcontractors will be in compliance with this Decree.

21. Pursuant to RCW 70.105D.040(4)(e)(ii), Ecology has determined that this Decree is not based on unique circumstances. Therefore, the stay of enforcement against successors in interest in RCW 70.105D.040(4)(e) applies to this Decree.

IV. DEFINITIONS

22. Unless otherwise expressly provided herein, terms used in this Decree that are defined in MTCA, Chapter 70.105D RCW, or in regulations promulgated under MTCA, Chapter 173-340 WAC, shall have the meaning assigned to them in MTCA or in such regulations. Whenever terms listed below are used in this Decree or in the attachments hereto, the following definitions shall apply:

“Decree” shall mean this Decree and all attachments hereto. In the event of conflict between this Decree and any Exhibit, this Decree shall control.

“Paragraph” shall mean a portion of this Decree identified by an Arabic numeral.

“Section” shall mean a portion of this Decree identified by a Roman numeral and including one or more Paragraphs.

“Site” shall mean the property located at 333 Elliott Avenue West in Seattle, Washington (the “Property”), and surrounding areas where hazardous substances released from the historic creosoting operations have come to be located. The Site is depicted on Exhibit A. The Site is a “facility” as defined in MTCA per RCW 70.105D.020(4).

“Successors in Interest and Assigns” shall mean any person who acquires an interest in the Site through purchase, lease, transfer, assignment, or otherwise.

V. STATEMENT OF FACTS

23. The Site is located at 333 Elliott Avenue West in Seattle, Washington. It is bounded to the west by railroad tracks owned by Burlington Northern Santa Fe, and beyond the tracks, by two parks owned by the City of Seattle: Myrtle Edwards Park and Elliott Bay Park. Elliott Bay is immediately adjacent to the two parks. The parcels north and south of the Site are used for commercial offices. The Site is bounded to the east by Elliott Avenue West.

24. The Property and the surrounding area were originally part of the Seattle Tide Lands. The first structures built on the Property were supported by piles. By 1920, the Property had been filled to reach its current grade.

25. From approximately 1893 to 1912, Colman Creosoting Works used the Property to produce and store creosote. Around 1912, the J.S. Vining Fuel Company began occupying the Property, which it used to provide wood, coal, and teaming. In the mid 1930s, Furnace Oil Service Company, Inc. replaced J.S. Vining as the tenant. In 1940, a building was constructed on the Property to house a restaurant. The restaurant, originally known as Crawford's Sea Grill and later known as Ivar's Captain's Table, operated at the Property between approximately 1942 and 1993. Beginning in 1993 and until recently, the former restaurant was used as a part-time

1 nightclub. The remainder of the Property, which is paved with asphalt, has been used as a
2 commercial parking lot.

3 26. Several environmental studies have been performed on the Site. Shannon &
4 Wilson, Inc. issued a Preliminary Geotechnical Report in October 1995; a report of its Modified
5 Level I Environmental Site Assessment (ESA) in July 1996; and a report of its Site Investigation
6 in September 1996. In addition, Ecology and Environment, Inc., working under contract to EPA,
7 issued a Final Integrated Assessment Report regarding the Site in March 1998. Environmental
8 Partners, Inc. (EPI) conducted additional site investigations in 2001 and 2002.

9 27. The investigations show that the Site is underlain by approximately thirty feet of
10 fill. The fill is followed by a natural fat clay or beach sand that is better compacted than the fill.
11 Ground water generally occurs at a depth of 8 feet below ground surface (bgs) across the Site.
12 The water level fluctuates diurnally approximately 0.3 feet. The cause of the fluctuation is
13 suspected to be from pumping in nearby basements. The investigations found elevated levels of
14 carcinogenic polycyclic aromatic hydrocarbons (CPAHs) and total naphthalenes in soils at the
15 Site. The total naphthalenes found at the Site are characteristic of contamination from the
16 creosote works. These contaminants of concern (COCs) do not appear to have affected the upper
17 ten feet of soils at the Site. Analytical results indicate the highest level of COCs in soil at
18 approximately 20 to 25 feet bgs.

19 28. These investigations also found elevated levels of the same COCs in groundwater
20 at the Site. Deep ground water (from 25 to 35 feet bgs) under the southern third of the Site is
21 most affected. Groundwater is not used as a source of drinking water at the Site or in
22 surrounding properties.

23 29. These environmental conditions were reported in a Remedial Investigation report
24 dated August 28, 2002. Based on the results of the Remedial Investigation, Defendant proposed
25 and Ecology approved a final remedy as outlined in the Work to be Performed, Section VII,
26 below and as described more fully in the attached CAP (Exhibit B).

1 **VI. DESCRIPTION OF PLANNED PROJECT**

2 30. Defendant intends to acquire and operate the Property.

3 31. Defendant plans to redevelop the Property for commercial use.

4 **VII. WORK TO BE PERFORMED, SCHEDULE**
5 **AND LAND USE RESTRICTIONS**

6 32. This Decree contains a program designed to protect public health, welfare, and the
7 environment from the known, suspected, or threatened release of hazardous substances or
8 contaminants at, on, or from the Site. The requirements of such program are described in detail in
9 this section of the Decree and in the Cleanup Action Plan (Exhibit B) and in the schedule set
10 forth in Exhibit C.

11 33. Defendant has performed the Remedial Investigation and agrees to perform the
12 remedial actions herein and as described in the CAP and Schedule to protect human health and
13 the environment from the release or threatened release of known or suspected hazardous
14 substances at or from the Site.

15 34. Defendant shall perform remedial actions in the attached CAP pursuant to the
16 Schedule attached at Exhibit C. Defendant, through its contractor(s) and subcontractor(s) as
17 necessary, shall accomplish the following tasks:

- 18 a) Obtain all necessary and applicable state, federal, and local permits to implement
19 this remedial action at the Site, see Exhibit B.
- 20 b) Construct temporary storage areas for clean and COC contaminated soils, and
21 pumped groundwater during excavation dewatering.
- 22 c) Excavate clean soils and stockpile on-Site, and excavate COC contaminated soils
23 and dispose off-Site at a certified landfill, and with treatment or recycling where
24 practical.

- 1 d) Conduct groundwater pumping to dewater soils during excavation using a
2 container system for temporary storage, and conduct confirmation testing for
3 discharge of pumped water to sanitary sewer or licensed disposal.
4 e) Conduct soil compliance monitoring to confirm completion of COC soil removal.
5 f) If soil compliance monitoring results exceed cleanup levels, then conduct
6 additional excavation and compliance monitoring, or record a restrictive covenant
7 documenting COC contaminated soils remaining at Site.
8 g) Conduct groundwater compliance monitoring.

9 Defendant agrees not to perform any remedial actions on the Site that are inconsistent with the
10 remedial actions required under this Consent Decree.

11 35. Defendant shall obtain any and all state, federal, or local permits required by
12 applicable law before commencing the remedial action at the Site, except as provided in
13 Section XXI. Defendant shall prepare a Site Safety and Health Plan in accordance with WAC
14 173-340-810 and the most recent OSHA, WISHA, Ecology, and EPA guidance and applicable
15 regulations, for Ecology review. Defendant shall also provide a security system at the Property
16 designed to prevent entry by unauthorized persons during the excavation work.

17 36. Defendant shall be prohibited from using the Site in a manner likely to cause or
18 contribute to the existing release, interfering with remedial actions performed or that may be
19 needed at the Site, or increasing health risks to persons or risks to the environment at or in the
20 vicinity of the Site.

21 37. Defendant shall record the Restrictive Covenant attached to this Decree as Exhibit
22 D with the King County Auditor's Office within thirty (30) days of the receipt of soil excavation
23 clearance sampling data required under this Decree, and shall provide Ecology with proof of such
24 recording within thirty (30) days of such recording. The Restrictive Covenant will apply only to
25 that portion of the Property on which hazardous substances are left in concentrations exceeding
26 cleanup levels. Defendant shall provide Ecology with a copy of the version of the Restrictive

1 Covenant proposed for filing at least seven (7) days prior to the actual filing of the document.
2 Defendant, or its Successors in Interest and Assigns, after confirmational monitoring has shown
3 that contaminants are no longer present at the Property above applicable cleanup levels, may
4 record an instrument that provides that the Restrictive Covenant provided in Exhibit D shall no
5 longer limit uses of the Property or be of any further force or effect, but only with Ecology's prior
6 written approval of such instrument.

7 **VIII. ECOLOGY COSTS**

8 38. Defendant agrees to pay costs incurred by Ecology pursuant to this Decree. These
9 costs shall include work performed by Ecology or its contractors for, or on, the Site under
10 Chapter 70-105D RCW, for investigations, remedial actions, oversight and administration
11 associated with this Decree (including preparation and negotiation of this Decree). Ecology costs
12 shall include costs of direct activities and support costs of direct activities as defined in WAC
13 173-340-550(2). Defendant agrees to pay the required amount within ninety (90) days of
14 receiving from Ecology an itemized statement of costs that includes a summary of costs incurred,
15 an identification of involved staff, and the amount of time spent by involved staff members on
16 the project. A general statement of work performed will be provided upon request. Itemized
17 statements and costs shall be prepared quarterly. Failure to pay Ecology costs within ninety (90)
18 days of receipt of the itemized statement will result in interest charges as allowed by law.
19 Defendant reserves the right to review and approve any charges prior to payment. Any dispute
20 regarding remedial and investigation costs for the Site shall be subject to dispute resolution
21 pursuant to Section XIV. Defendant reserves the right to pay the undisputed portion of an
22 invoice and not pay the disputed portion.

1 **IX. DESIGNATED PROJECT COORDINATORS**

2 39. The project coordinator for Ecology is:

3 Maura S. O'Brien
4 Professional Geologist/Hydrogeologist #869
5 Toxics Cleanup Program
6 Department of Ecology
7 Northwest Regional Office
8 3190 160th Avenue Southeast
9 Bellevue, WA 98008
10 Telephone: (425) 649-7000

11 The project coordinator for Defendant is:

12 John Brasino, Ph.D., P.E.
13 Environmental Partners, Inc.
14 10940 NE 33rd Place, Suite 110
15 Bellevue, WA 98004
16 Telephone: (425) 889-4747

17 40. Each project coordinator shall be responsible for overseeing the implementation
18 of this Decree. The Ecology project coordinator will be Ecology's designated representative at
19 the Site. To the maximum extent possible, communications between Ecology and Defendant and
20 all documents, including reports, approvals, and other correspondence concerning the activities
21 performed pursuant to the terms and conditions of this Decree, shall be directed through the
22 project coordinators. The project coordinators may designate, in writing, working-level staff
23 contacts for all or portions of the implementation of the Work to be Performed, Section VII, and
24 attached Cleanup Action Plan. The project coordinators may agree to minor modifications to the
25 work to be performed without formal amendments to this Decree.

26 41. Any party may change its respective project coordinator. Written notification
shall be given to the other parties at least ten (10) calendar days prior to the change.

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50. If Ecology's final written decision is unacceptable to Defendant, Defendant shall have the right to submit the dispute to the Court for resolution. The parties agree that one judge should retain jurisdiction over this case and shall as necessary, resolve any dispute arising under this Decree. In the event Defendant presents an issue to the Court for review, the Court shall review any investigative or remedial action or decision of Ecology under an arbitrary and capricious standard of review.

51. The parties agree to use the dispute resolution process in good faith and agree to expedite, to the extent possible, the dispute resolution process whenever it is used. When either party uses the dispute resolution process in bad faith or for purposes of delay, the other party may seek sanctions. The parties may agree to substitute another dispute resolution process, such as mediation, for the procedure set forth above.

52. The implementation of these dispute resolution procedures shall not provide a basis for delay of any activities required in this Decree, unless Ecology agrees in writing to a schedule extension or the Court so orders.

XV. CONTRIBUTION PROTECTION

53. With regard to claims for contribution against Defendant for matters addressed in this Decree, Ecology agrees that Defendant, its Successors in Interest and Assigns are entitled to protection from contribution actions or claims as is provided by MTCA, RCW 70.105D.040, CERCLA § 107 or 113, or any other federal or state claim seeking, under other theories, substantially similar relief, to the extent allowed by MTCA, RCW 70.105D.040 and CERCLA § 113(f)(2). The contribution protection conferred in this section shall not be frustrated by the use of non-CERCLA or non-MTCA theories to seek relief in the nature of contribution or indemnification.

54. For purposes of this Section, “matters addressed” include all remedial actions taken or to be taken and all remedial action costs (including Ecology’s oversight costs) incurred

1 or to be incurred by Ecology or any other person with respect to the Site. "Matters addressed" do
2 not include those remedial actions or remedial action costs as to which Ecology has reserved its
3 rights under this Consent Decree (except for claims for failure to comply with this Decree), if
4 Ecology asserts rights against Defendant coming within the scope of such reservations.

5 **XVI. COVENANT NOT TO SUE UNDER MTCA; REOPENERS**

6 55. In consideration of compliance by Defendant with the terms and conditions of this
7 Decree, Ecology agrees that compliance with this Decree shall stand in lieu of any and all
8 administrative, legal, and equitable remedies and enforcement actions available to Ecology
9 against Defendant for the release or threatened release of known or suspected hazardous
10 substances at the Site covered by the terms of this Decree. Ecology covenants not to sue
11 Defendant, its Successors in Interest and Assigns for matters covered by the terms of this Decree,
12 provided that Defendant, or its Successors in Interest and Assigns, has substantially complied
13 with this Decree.

14 A. Reopeners: In the following circumstances the State of Washington may
15 exercise its full legal authority to address releases of hazardous substances at the Site
16 notwithstanding the Covenant Not to Sue set forth above:

- 17 1. In the event Defendant fails to comply with the terms and
18 conditions of this Decree, including all attachments, and, after
19 written notice of noncompliance, fails to come into compliance.
- 20 2. In the event new information becomes available regarding factors
21 previously unknown to Ecology, and Ecology determines, in light
22 of this information, that further remedial action is necessary at the
23 Site to protect human health or the environment.
- 24 3. In the event the remedial action conducted at the Site fails to meet
25 the requirements set forth in Section VII of this Decree and the
26 attached Cleanup Action Plan.
4. In the event the Property is used for any activities that contribute to
the existing release or threatened release, interfere with remedial

actions that may be needed at the Site, or increase health risks to persons at or in the vicinity of the Site.

B. Applicability. The Covenant Not To Sue set forth above shall have no applicability whatsoever to:

1. Criminal liability;
2. Any Ecology action against PLPs not party to this Decree; and
3. Any claims by the State for Natural Resources Damages.

XVII. DEFENDANT'S RESERVATION OF RIGHTS

56. Defendant reserves all rights and defenses that it may have and which are not otherwise addressed in the Decree.

57. Except as provided herein for Defendant, this Decree does not grant any rights or affect any liabilities of any person, firm or corporation or subdivision or division of state, federal, or local government.

XVIII. DISCLAIMER

58. This Decree does not constitute a representation by Ecology that the Site is fit for any particular purpose.

XIX. RETENTION OF RECORDS

59. Defendant shall retain all records, reports, documents, and underlying data in its possession relevant to the implementation of this Decree during the pendency of this Decree and for a period of ten years following the termination of this Decree pursuant to Paragraph 80, and shall insert in contracts with project contractors and subcontractors a similar records retention requirement. Upon request of Ecology, Defendant shall make all non-archived records available to Ecology and allow Ecology reasonable access for record review. All archived records shall be made available to Ecology by Defendant within a reasonable period of time.

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1 64. Ecology shall ensure that notice and opportunity for comment is provided to the
2 public and appropriate agencies prior to establishing the substantive requirements under this
3 section.

4 65. Pursuant to RCW 70.105D.090(2), in the event that Ecology determines that the
5 exemption from complying with the procedural requirements of the laws referenced in RCW
6 70.105D.090(1) would result in the loss of approval from a federal agency necessary for the state
7 to administer any federal law, such exemption shall not apply and Defendant shall comply with
8 both the procedural and substantive requirements of the laws referenced in RCW
9 70.105D.090(1), including any requirements to obtain permits.

10 **XXII. SAMPLING, DATA REPORTING, AND AVAILABILITY**

11 66. With respect to the implementation of this Decree, Defendant shall make the
12 results of all sampling, laboratory reports, and/or test results generated by it, or on its behalf
13 available to Ecology and shall submit these results in accordance with Section XXIII of this
14 Decree.

15 67. If requested by Ecology, Defendant shall allow split or duplicate samples to be
16 taken by Ecology and/or Ecology's authorized representatives of any samples collected by
17 Defendant pursuant to the implementation of this Decree. Defendant shall notify Ecology at least
18 seven (7) working days in advance of any sample collection or work activity at the Site. Ecology
19 shall, upon request, allow split or duplicate samples to be taken, at Defendant's sole expense, by
20 Defendant, or its authorized representatives, of any samples collected by Ecology pursuant to the
21 implementation of this Decree, provided it does not unreasonably interfere with the
22 Department's sampling. Without limiting Ecology's rights under Section XX, Ecology shall
23 endeavor to notify Defendant at least five (5) working days prior to any sampling collection
24 activity.
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1 **XXIII. PROGRESS REPORTS**

2 68. Defendant shall submit to Ecology written progress reports that describe the
3 actions taken to implement the requirements of this Decree. The progress report shall be
4 prepared as set forth in the following schedule:

5 *Monthly during the excavation action; and

6 *Semi-Annually during compliance monitoring activities.

7 The progress reports shall contain the following:

8 A. A list of on-Site activities that have taken place during the reporting
9 period;

10 B. Detailed description of any deviations from required tasks not otherwise
11 documented in project plans or amendment requests;

12 C. Description of all deviations from the schedule during the current
13 reporting period and any planned deviations in the upcoming reporting period;

14 D. For any deviations in schedule, a plan for recovering lost time and
15 maintaining compliance with the schedule;

16 E. All data (including laboratory analyses) which, after the QA/QC program
17 has been performed, have been received by Defendant during the past reporting period and an
18 identification of the source of the samples; and

19 F. A list of deliverables for the upcoming reporting period if different from
20 the schedule.

21 69. All progress reports shall be submitted by the tenth day of the month following
22 each reporting period after the effective date of this Decree. Unless otherwise specified, progress
23 reports and any other documents submitted pursuant to this Decree will be submitted in hard
24 copy and electronic copy. Hard copies shall be sent by US mail, to Ecology's project
25 coordinator.
26

XXIV. EXTENSION OF SCHEDULE

70. An extension of schedule shall be granted only when a request for an extension is submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the deadline for which the extension is requested, and when good cause exists for granting the extension. All extensions shall be requested in writing. The request shall specify the reason(s) the extension is needed.

71. An extension shall only be granted for such period of time as Ecology determines is reasonable under the circumstances. A requested extension shall not be effective until approved by Ecology. Ecology shall act upon any written request for extension in a timely fashion. It shall not be necessary to formally amend this Decree pursuant to Section XIII when a schedule extension is granted.

72. The burden shall be on Defendant to demonstrate to the satisfaction of Ecology that the request for such extension has been submitted in a timely fashion and that good cause exists for granting the extension. Good cause includes, but is not limited to, the following: (1) circumstances beyond the reasonable control and despite the due diligence of Defendant, including delays caused by unrelated third parties or Ecology, such as (but not limited to) delays by Ecology in reviewing, approving, or modifying documents submitted by Defendant; or (2) Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or other unavoidable casualty; or (3) endangerment as described in Section XXV.

73. However, neither increased costs of performance of the terms of the Decree nor changed economic circumstances shall be considered circumstances beyond the reasonable control of Defendant.

74. Ecology may extend the schedule for a period not to exceed ninety (90) days, except where an extension is needed as a result of:

- (1) Delays in the issuance of a necessary permit that was applied for in a timely manner; or

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- (2) Other circumstances deemed exceptional or extraordinary by Ecology; or
- (3) Endangerment as described in Section XXV.

75. Ecology shall give Defendant written notification in a timely fashion of any extensions granted pursuant to this Decree.

XXV. ENDANGERMENT

76. In the event Ecology determines that activities implementing or in compliance with this Decree, or any other circumstances or activities, are creating or have the potential to create a danger to the health or welfare of the people on the Site or in the surrounding area or to the environment, Ecology may order Defendant to stop further implementation of this Decree for such period of time as needed to abate the danger or may petition the Court for an order as appropriate. During any stoppage of work under this Section, the obligations of Defendant with respect to the work under this Decree that is ordered to be stopped shall be suspended and the time periods for performance of that work, as well as the time period for any other work dependent upon the work that is stopped, shall be extended, pursuant to Section XXIV of this Decree, for such period of time as Ecology determines is reasonable under the circumstances.

77. In the event Defendant determines that activities undertaken in furtherance of this Decree or any other circumstances or activities are creating an endangerment to the people on the Site or in the surrounding area or to the environment, Defendant may stop implementation of this Decree for such period of time necessary for Ecology to evaluate the situation and determine whether Defendant should proceed with implementation of the Decree or whether the work stoppage should be continued until the danger is abated. Defendant shall notify Ecology's project coordinator as soon as possible, but no later than twenty-four (24) hours after such stoppage of work, and thereafter provide Ecology with documentation of the basis for the work stoppage. If Ecology disagrees with Defendant's determination, it may order Defendant to resume implementation of this Decree. If Ecology concurs with the work stoppage, Defendant's

1 obligations shall be suspended and the time period for performance of that work, as well as the
2 time period for any other work dependent upon the work that was stopped, shall be extended,
3 pursuant to Section XXIV of this Decree, for such period of time as Ecology determines is
4 reasonable under the circumstances.

5 **XXVI. IMPLEMENTATION OF REMEDIAL ACTION**

6 78. If Ecology determines that Defendant has failed without good cause to implement
7 the remedial action described herein and in the CAP, Ecology may, after notice to Defendant,
8 perform any or all portions of the remedial action that remain incomplete. If Ecology performs
9 all or portions of the remedial action because of Defendant's failure to comply with the
10 obligations under this Decree, Defendant shall reimburse Ecology for the costs of doing such
11 work, provided that Defendant shall not be obligated under this Section to reimburse Ecology for
12 costs incurred for work inconsistent with or beyond the scope of this Decree.

13 **XXVII. PUBLIC PARTICIPATION**

14 79. Ecology shall maintain the responsibility for public participation at the Site.
15 However, Defendant shall cooperate with Ecology with respect to the following public
16 participation activities:

17 A. Prepare drafts of public notices and fact sheets at important stages of the
18 remedial action, such as the submission of work plans and engineering design reports. Ecology
19 will finalize (including editing if necessary) and distribute such fact sheets and prepare and
20 distribute public notices of Ecology's presentations and meetings;

21 B. Each party shall notify the other party's project coordinator prior to the
22 preparation of all press releases and fact sheets, and shall allow the other party to review and
23 comment on the documents. In addition, each party shall notify the other party's project
24 coordinator at least one week before major meetings with the interested public and local
25 governments regarding the remediation of the Site;
26

1 C. Participate in public presentations on the progress of the remedial action at
2 the Site. Participation may be through attendance at public meetings to assist in answering
3 questions, or as a presenter;

4 D. In cooperation with Ecology, arrange and/or continue information
5 repositories to be located at the following locations:

6 Seattle Public Library
7 Downtown Branch
8 Government Documents
9 1000 4th Avenue, 2nd Floor
10 Seattle, Washington

11 Department of Ecology
12 Northwest Regional Office
13 3190 160th Avenue Southeast
14 Bellevue, Washington

15 At a minimum, copies of all public notices, fact sheets, and press releases, all quality assured
16 monitoring data, remedial action plans, supplemental remedial planning documents, and all other
17 similar documents relating to performance of the remedial action required by this Decree shall be
18 promptly placed in these repositories.

19 **XXVIII. DURATION OF DECREE AND RETENTION OF JURISDICTION;**
20 **CERTIFICATIONS BY ECOLOGY**

21 80. This Decree shall remain in effect and this Court shall retain jurisdiction over both
22 the subject matter of this Decree and the parties for the duration of the performance of the terms
23 and provisions of this Decree for the purpose of enabling any of the parties to apply to the Court,
24 consistent with the dispute resolution process set forth in Section XIV, and the amendment
25 process set forth in Section XIII, for such further order, direction, and relief as may be necessary
26 or appropriate to ensure that obligations of the parties have been satisfied. The Decree shall
remain in effect until Defendant has received written notification from Ecology that the
requirements of this Decree have been satisfactorily completed. Ecology shall provide such

1 written notification or notice of any deficiencies in the completion of the requirements of this
2 Decree within one hundred and eighty (180) days of receiving notice from Defendant that the
3 requirements of the Decree have been satisfied. Within sixty (60) days of Defendant's written
4 notice that any noted deficiencies have been corrected, Ecology shall provide written notification
5 that the requirements of the Decree have been satisfied or notice of any deficiencies that still
6 remain. The notification of completion shall be in substantially the form shown in Exhibit E.
7 Upon receipt of written notification from Ecology that the requirements of this Decree have been
8 satisfactorily completed, the parties shall move the Court to dismiss the Consent Decree. The
9 provisions set forth in Section XV (Contribution Protection), Section XVI (Covenant Not to Sue
10 Under MTCA; Reopeners), Section XXX (Indemnification), and other such continuing or
11 reserved rights of Defendant or Ecology under this Decree shall survive the dismissal of the
12 Decree pursuant to this paragraph. This Decree shall in no way limit the authority of Ecology to
13 obtain all legal or equitable remedies available against persons not party to this Decree and
14 against all persons, parties or non-parties, for releases of hazardous substances at the Site not
15 covered by this Decree.

16 **XXIX. PUBLIC NOTICE AND WITHDRAWAL OF CONSENT**

17 81. This Decree has been the subject of public notice and comment under RCW
18 70.105D.040(4)(a). As a result of this process, Ecology has found that this Decree will lead to a
19 more expeditious cleanup of hazardous substances, in compliance with applicable cleanup
20 standards, and is in the public interest.

21 82. If the Court withdraws its consent, this Decree shall be null and void at the option
22 of any party and the accompanying complaint shall be dismissed without costs and without
23 prejudice. In such an event, no party shall be bound by the requirements of this Decree. This
24 paragraph shall not create a basis for withdrawal of consent or termination of this Decree other
25 than those created by the terms of this Decree or that exist by operation of law or equity.
26

1 **XXX. INDEMNIFICATION**

2 83. Defendant agree to indemnify and save and hold the State of Washington, its
3 employees, and agents harmless from any and all claims or causes of action for death or injuries
4 to persons or for loss or damage to the Site arising from or on account of acts or omissions of
5 Defendant, its officers, employees, agents, or contractors in entering into and implementing this
6 Decree. However, Defendant shall not indemnify the State of Washington nor save nor hold its
7 employees and agents harmless from any claims or causes of action arising out of the negligent
8 acts or omissions of the State of Washington, or employees or agents of the State, or its
9 contractors in implementing the activities pursuant to this Decree.

10 **XXXI. CLAIMS AGAINST THE STATE**

11 84. Defendant hereby agrees that it will not seek to recover any costs accrued in
12 implementing the remedial action required by this Decree from the State of Washington or any of
13 its agencies and further that Defendant will make no claim against the state toxics control
14 account or any local toxics control account for any costs incurred in implementing this Decree.
15 Except as provided above, however, Defendant expressly reserves its rights to seek to recover
16 any costs incurred in implementing this Decree from any other PLP.

17 **XXXII. EFFECTIVE DATE**

18 85. This Decree is effective only after the date on which title to the Property vests in
19 Defendant and the date on which the Court enters the Decree.

20 So ordered this ____ day of _____, 2002.

21
22
23 _____
24 JUDGE
25 King County Superior Court
26

1 The undersigned parties enter into this Prospective Purchaser Consent Decree on the date
2 specified below.

3
4 333 ELLIOTT AVENUE WEST, LLC

5 _____
6 _____ WSBA #

7 DATED _____

DATED _____

8
9
10 CHRISTINE O. GREGOIRE
11 Attorney General, by and through

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

12
13 _____
14 STEVEN J. THIELE, WSBA #20275
15 Assistant Attorney General
16 Attorney for Plaintiff
State of Washington
Department of Ecology

_____ James Pendowski
Program Manager
Toxics Cleanup Program

17 DATED _____

DATED _____